COMMONWEALTH OF VIRGINIA
Department of Environmental Quality

Subject: Enforcement Guidance Memorandum No. 1-2006
Voluntary Environmental Assessments: statutory privilege from disclosing documents; statutory immunity from administrative or civil penalties; and enforcement discretion policy for "self-policing" through voluntary environmental audits and environmental management systems

To: Regional Directors, Division Directors

From: Amy T. Owens, Director
Division of Enforcement

Date: June 13, 2006

Copies: Rick Weeks, Deputy Regional Directors, Regional Enforcement Managers and Representatives, Regional Compliance Auditors, Regional Compliance Managers, Central Office Compliance Managers, Central Office Enforcement Managers, Rick Linker, Melissa Porterfield, Sharon Baxter, Sharon Brown

I. Background and Summary[1]

The Department of Environmental Quality ("DEQ") promotes voluntary environmental assessments and encourages facility owners and operators to voluntarily discover, disclose, correct, and prevent violations of environmental requirements.

Under Virginia statutes, facility owners or operators who perform voluntary environmental assessments enjoy a privilege from disclosing the resulting documents *and* immunity from all administrative or civil penalties for the violations they discover as a result, so long as the violations are voluntarily and promptly disclosed and corrected. The laws have qualifications, however, and they do not apply to programs that have been authorized, delegated, or approved by the U.S. EPA ("federally authorized programs").[2]

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[1] Disclaimer: Guidance documents are developed as guidance and, as such, set forth presumptive operating procedures. *See* Va. Code § 2.2-4001. Guidance documents do not establish or affect legal rights or obligations, do not establish a binding norm, and are not determinative of the issues addressed. Decisions in individual cases will be made by applying the laws, regulations, and policies of the Commonwealth to case-specific facts. No previous DEQ guidance addresses the issues here.

[2] *See* January 12, 1998 letter from Virginia Attorney General Richard Cullen to EPA Region III Administrator Michael McCabe, styled *General Responses Regarding Virginia's Environmental Assessment Privilege and Immunity Law* (Attachment 1). In May 2006, the Division of Enforcement confirmed that there have been no changes in the law or analysis that would cause a different interpretation of these issues. Federally authorized programs potentially include: (1) the Virginia Pollutant Discharge Elimination System ("VPDES"), Pretreatment, and Wetlands programs under the Clean Water Act; (2) the Hazardous Waste (Subtitle C), Solid Waste (Subtitle D), and Underground Storage Tank (Subtitle I)

For federal enforcement of these programs, EPA has issued its own policy on "self-policing," commonly called the "Audit Policy." For state enforcement of federally authorized programs (or if the conditions of the immunity statute are not met), DEQ uses its enforcement discretion to adhere in large measure to the federal Audit Policy.

This guidance describes the review and processing of assertions of state privilege and immunity, and the exercise of state enforcement discretion using criteria similar to those in the federal Audit Policy, for violations found during voluntary environmental assessments and voluntary environmental audits.

Neither the state statutes nor the federal policy affect the obligation of facility owners and operators to correct violations and remediate their effects. [3]

II. Statutory Requirements and Enforcement Discretion

In 1995, the Virginia General Assembly passed Va. Code § 10.1-1198 - *Voluntary environmental assessment privilege* and Va. Code § 10.1-1199 - *Immunity against administrative or civil penalties for voluntarily disclosed violation*. These companion provisions encourage the use of voluntary environmental assessments (sometimes called "environmental audits") to identify noncompliance with environmental requirements, and provide qualified immunity against administrative and civil penalties, if violations are discovered during the course of such an assessment. The statutes do not provide relief from criminal sanctions, nor from civil injunctive relief or other appropriate regulatory action. Section 10.1-1198 defines an environmental assessment as:

> [A] voluntary evaluation of activities or facilities or of management systems related to such activities or facilities that is designed to identify noncompliance with environmental laws and regulations, promote compliance with environmental laws and regulations, or identify opportunities for improved efficiency or pollution prevention.

Va. Code § 10.1-1198 - Voluntary Environmental Assessment Privilege

Va. Code § 10.1-1198 provides a privilege against compelled production of a document[4] resulting from a voluntary environmental assessment or information about its contents; a prohibition on the admissibility of such documents in administrative or

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programs under the Resource Conservation Recovery Act; and (3) the Title V, New Source Performance Standards, National Emission Standards for Hazardous Air Pollutants, and New Source Review Programs under the Clean Air Act. *See* Statement of Principles – Effect of State Audit Immunity/Privilege Laws on Enforcement Authority for Federal Programs (EPA, February 14, 1997) (Attachment 2). If there is a question whether a program or requirement is federally authorized, staff should contact the appropriate program office. For example, only portions of the Solid Waste Program are subject to federal approval under RCRA Subtitle D.

[3] This guidance does not address legislation on Brownfields, Va. Code § 10.1-1230, *et seq.*

[4] "Document" means information collected, generated or developed in the course of, or resulting from, an environmental assessment, including but not limited to field notes, records of observation, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, videotape, computer-generated or electronically recorded information, maps, charts, graphs and surveys. Va. Code § 10.1-1198.

judicial proceedings without the written consent of the facility owner or operator; and a privilege against production of the document under a state information request.

Exceptions to the privilege are as follows:

- where information demonstrates a clear, imminent, and substantial danger to the public health or the environment;
- where the information was generated or developed before the commencement of the voluntary environmental assessment showing noncompliance;
- where the document is required by law (including documents or other information needed for civil or criminal enforcement of federally authorized programs);
- where the document was prepared independently of the voluntary environmental assessment; or
- where the document was collected, generated, or developed in bad faith.

If any of the exceptions apply, then the facility owner or operator is not entitled to the privilege under Va. Code § 10.1-1198.

Va. Code § 10.1-1199 - Immunity Against Administrative or Civil Penalties for Voluntarily Disclosed Violation

This section provides that any person making a voluntary disclosure of information to a state or local regulatory agency regarding a violation of an environmental statute, regulation, permit, or administrative order is immune from **ANY** administrative or civil (not criminal) penalty, so long as **ALL** of the following criteria are met:

- *Discovery is made through a voluntary environmental assessment.*
- *Disclosure is not already required by law, regulation, permit, or administrative order.* For example, failure to report an oil spill would not qualify for immunity, since the State Water Control Law requires immediate reporting of all oil spills.
- *Disclosure is made promptly after discovery.* To be prompt, notification should be provided to the Regional Director of the appropriate DEQ Regional Office ("RO") within 21 calendar days after discovery.
- *The violation is corrected in a diligent manner.* Correction should occur within 60 calendar days of discovery, or under an acceptable compliance schedule submitted to the DEQ Regional Office within the same period. As

necessary, correction should be incorporated into a letter of agreement or an order.

- *The person making the disclosure has not acted in bad faith.* Examples of bad faith include rushing to commence or complete an assessment in anticipation of a pending government inspection or investigation, or the ensuing report (unless DEQ determines that the facility owner or operator did not know of the pending inspection or investigation and that it is otherwise acting in good faith), and an audit following the transfer of a facility with a poor compliance history to a new subsidiary of the same company or group of companies.

- *The disclosed violations are not violations of a federally authorized program.* Federally authorized programs are described in footnote 2, above.

If any of the criteria are not met, then the disclosing owner or operator is not entitled to immunity from penalties under Va. Code § 10.1-1199. However, even if the disclosure fails to qualify for statutory *immunity* (either because the violation arises under a federally authorized program, or because the circumstances do not meet the criteria for statutory immunity), it is generally appropriate policy to exercise enforcement *discretion* as to penalties in keeping with the federal policy on self-policing.

Enforcement Discretion Using the Federal Policy on Self-Policing

There are no federal statutes conferring privilege or immunity for voluntary environmental assessments; however, EPA has a *policy* called *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations* (FLR-6576-3, effective May 11, 2000),[5] commonly called "the Audit Policy." The Audit Policy outlines circumstances in which EPA will exercise its enforcement discretion and forego some or all administrative or civil penalties for "regulated entities" that voluntarily discover, disclose, and correct noncompliance, and take steps to prevent future noncompliance.

Virginia statutory immunity and federal enforcement discretion are not the same. Virginia immunity is available as a matter of law where it applies, while federal enforcement discretion is mere policy. Further, the criteria recited in the Virginia statute and the federal policy, while similar, are not identical. The terminology is also different – where Virginia statutes refer to "voluntary environmental assessments" and "facility owners or operators," the federal policy refers to "environmental audits" and "regulated entities."

[5] DEQ's guidance for enforcement discretion is taken generally from this document; however, clarifications and changes have been made to better suit the requirements and needs of Virginia programs and constituents. DEQ will adhere to the federal policy to the extent described in this guidance.

In keeping with federal policy, DEQ should exercise enforcement discretion and forego collection of **100%** of the **gravity**[6] portion of an administrative or civil penalty, if the regulated entity reports violations discovered during an environmental audit and meets **ALL** of the following criteria:

- *The violation is discovered using systematic methodology.* Examples of systematic methodologies include an environmental audit; an EMS that includes components for compliance due diligence in preventing, detecting, and correcting violations; and a similar EMS at an extraordinary environmental enterprise ("E4") or an exemplary environmental enterprise ("E3") facility in the Virginia Environmental Excellence Program ("VEEP").

- *The discovery of the violation is voluntary.* The violation should be discovered voluntarily, and not as a result of a mandatory monitoring, sampling, or auditing procedure required by law, regulation, permit, or enforcement action. Examples of mandatory actions include continuous emissions monitoring, VPDES sampling, and media-specific compliance audits required by an enforcement action. However, the discovery is still considered voluntary if the violations are found under a comprehensive, multi-media EMS, even if the EMS was required by an enforcement action.[7]

- *Disclosure of the violation is prompt.* Discovered violations should be disclosed in writing to the Regional Director of the appropriate DEQ Regional Office within 21 calendar days of discovery or when an officer, director, employee, or agent of the facility has an objectively reasonable basis for believing that a violation has, or may have, occurred. A shorter time may be prescribed by law. Disclosure should be immediate in the event that the violation poses a threat to human health or the environment. At the discretion of the Regional Director, an extension may be allowed for receipt of the final violation report or documentation.

- *Discovery and disclosure are independent of government or third parties.* The violation should be discovered and disclosed before the government or a third party likely would have identified the violation. Examples of disclosure not meeting the "independent" criteria include those made: during the pendency of a government inspection or investigation, or the ensuing report (unless DEQ determines that the regulated entity did not know of the pending inspection or investigation and that it is otherwise acting in good faith); after the issuance of an information request from the government to the entity; following notice of a citizen suit, report of a "whistleblower," or other complaint by a third party; and when discovery of the violation by a regulatory agency is imminent.

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[6] DEQ retains its full discretion to recover any economic benefit gained as a result of noncompliance to preserve a "level playing field" in which violators do not gain a competitive advantage over complying entities; however, the Regional Office may forego collection of economic benefit in addition to the gravity component in the event that the economic benefit component is not significant.

[7] Both EPA and DEQ take this view to encourage and reward the implementation of EMS programs.

- *Correction and remediation are timely.* Corrections should be completed within 60 calendar days from the date of discovery and notification of such provided in writing to the DEQ RO, or a satisfactory implementation plan and schedule for corrective action and remediation should be submitted to the DEQ Regional Office within 60 calendar days. Schedules for corrective action should be incorporated into enforcement orders if determined to be necessary by the Regional Office. Compliance schedules are public documents.

- *Steps are taken to prevent reoccurrence.* Regulated entities should document to DEQ the steps being taken to prevent a recurrence of the violation.

- *The violation is not a repeat violation.* Repeat violations are those resulting from errors or omissions that are the same or substantially similar and that have occurred at the same facility in the previous three years, or that are consistent with a recognizable pattern of similar violations across multiple facilities in the previous five years. In addition, the regulated entity should not have been subject to more than two enforcement actions in the previous three years.

- *The violation is not an excluded violation.* Examples of excluded violations are: those resulting in serious, actual harm to the environment; those that may have presented an imminent and substantial endangerment to human health or the environment; those that are violations of enforcement actions; and those that are not asserted in good faith.

- *The regulated entity cooperates fully in the documentation, disclosure, and correction of the violations.*

If a regulated entity meets all criteria except "systematic discovery" (the first criterion listed above), DEQ should exercise enforcement discretion and forego collection of **75%** of the **gravity**[8] portion of an administrative or civil penalty.

III. Procedure

Privilege from Disclosure of Documents or Information

A person or entity asserting a voluntary environmental assessment privilege has the burden of proving a *prima facie* case as to the privilege. If DEQ seeks disclosure of a document or information, it has the burden of proving the applicability of an exception to the voluntary environmental assessment privilege. Va. Code § 10.1-1198 (C) contains detailed procedures for asserting and contesting a claim of privilege against the production of documents. If a facility owner or operator asserts the privilege, RO staff

[8] See footnote 6.

should contact CO enforcement staff for assistance. Note that owners or operators waive the privilege as to any information they disclose voluntarily.[9]

Immunity or Enforcement Discretion for Administrative or Civil Penalties

A facility owner or operator seeking relief should contact the Regional Office. A facility owner or operator seeking penalty relief for voluntary disclosure of violations should address a written request to the appropriate Regional Director detailing how its request meets Virginia immunity criteria, or the federal audit policy criteria as recited in this guidance, or both. The full request and explanation need not be submitted within the 21 calendar days of discovery of the violation, so long as the violation at issue is fully disclosed within that time. If additional clarification or information is needed, the RO should request it by telephone, facsimile, or letter, documenting the request to the file.

Regional Office evaluation. In reviewing the submitted information, the Region should consult with CO enforcement. If the facility is a VEEP participant, the Region should also consult with VEEP staff. The RO should also notify the appropriate CO Division if one of programs operated primarily from CO is impacted. An evaluation of and recommendation on the request should then be made by RO staff to the Regional Director by means of an Enforcement Recommendation and Plan ("ERP"). The ERP should also include an evaluation of the sufficiency of the corrective action measures taken and/or proposed, a recommendation whether part of the penalty should be collected (presuming enforcement discretion criteria are met, but not immunity criteria), and a recommendation whether an enforcement order is appropriate to ensure correction is completed. In no event should any DEQ staff acknowledge immunity or pledge enforcement discretion on penalties until corrective action is completed or substantially underway.

Response to regulated party. DEQ should attempt to respond to the requestor in writing within 30 calendar days of the request. If an enforcement order is needed to memorialize and make enforceable a plan and schedule for corrective action, DEQ should also schedule a meeting within that time to discuss and finalize the necessary enforcement order. It is appropriate that DEQ enforcement documents recite the facility owner or operator's level of cooperation and the voluntary nature of the violation's discovery and disclosure.

Agency Documentation. Both the state immunity statute and the federal Audit Policy impact only potential penalties resulting from violations, not the underlying violations themselves. Therefore, Regional Office responses to violations (documentation of violations in CEDS and transfer of data to appropriate federal authorities; issuance of Warning Letters, Notices of Violation, and consent orders for injunctive relief) should follow usual practice in recording and documenting the violation. The agency documents and database entries, however, should also show that

[9] If access to a document or information is obtained, not voluntarily, but by order of a hearing examiner or a court, the information may not be divulged, except as specifically allowed by the hearing examiner or the court. Va. Code § 10.1-1198 (C).

the violation was self-disclosed. DEQ should notify EPA when DEQ exercises enforcement discretion in response to voluntary reporting at a major or other federally-tracked facility in a federally authorized program.

The applicability of penalties is not a case decision under the Administrative Process Act. If the facility owner or operator qualifies for immunity under Va. § 10.1-1199, then the immunity is an existing affirmative defense to any agency action for penalties. Enforcement discretion under the federal criteria is a decision which is wholly discretionary on the part of DEQ.

IV. Conclusion

This guidance is summary in nature. Staff should consult with CO enforcement staff if they receive an assertion of privilege or a request for immunity or enforcement discretion regarding a voluntary environmental assessment or environmental audit.

An electronic copy of this guidance is available on DEQ's website at: http://www.deq.virginia.gov.

Attachment 1 -Letter from Virginia Attorney General Richard Cullen to EPA Region III Administrator Michael McCabe, styled *General Responses Regarding Virginia's Environmental Assessment Privilege and Immunity Law* (January 12, 1998)

Attachment 2 - *Statement of Principles – Effect of State Audit Immunity/Privilege Laws on Enforcement Authority for Federal Programs* (EPA, February 14, 1997)

COMMONWEALTH of VIRGINIA

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January 12, 1998

The Honorable Michael McCabe
Regional Administrator, Region III
U.S. Environmental Protection Agency
841 Chestnut Building
Philadelphia, Pennsylvania 19107

General Responses Regarding Virginia's
Environmental Assessment Privilege and Immunity Law

Dear Mr. McCabe:

We have received EPA's September 4, 1997 letter requesting information regarding whether Virginia's Environmental Assessment Privilege and Immunity Law (§§ 10.1-1198 and 10.1-1199 of the Code of Virginia ("Code")) ("Environmental Privilege/Immunity Law") deprives the Commonwealth of adequate authority to enforce various requirements of our environmental programs that have been authorized, delegated, or approved by EPA or whose authorization, delegation, or approval by EPA is pending (collectively, "Virginia's federally authorized environmental programs"). With this letter, I respond to the questions presented in the Cross-Programmatic Enclosure to that letter. As explained fully below, none of Virginia's federally authorized environmental programs are subject to the Environmental Privilege/Immunity Law.

1. Virginia's Environmental Privilege/Immunity Law

Virginia's Environmental Privilege/Immunity Law was enacted in 1995 and is found at §§ 10.1-1198 and 10.1-1199 of the Code. Section 10.1-1198 provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. Not protected by the privilege are documents or information (1) that are generated or developed before the commencement of a voluntary environmental assessment; (2) that are prepared independently of the assessment process; (3) that demonstrate a clear, imminent, and substantial danger to the public health or environment; or (4) that are required by law. "Document" is defined to include "field notes, records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, videotape, computer-generated or electronically recorded information, maps, charts, graphs and surveys." Any document submitted to the Commonwealth pursuant to its federally authorized environmental programs would fall within this definition. See Cross-Programmatic Enclosure, No. 3. As discussed below, however, documents (and information about the content of those documents) that are needed for civil and criminal enforcement of Virginia's federally authorized environmental programs would not be privileged.

Section 10.1-1199 provides that immunity from administrative or civil penalty, "[t]o the extent consistent with requirements imposed by federal law," may be accorded to persons making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order. As explained below, this immunity is not available in civil and criminal enforcement of Virginia's federally authorized environmental programs.

2. Non-Applicability of Environmental Privilege/Immunity Law

In general, the Environmental Privilege/Immunity Law does not limit the Commonwealth's civil and criminal enforcement authority for Virginia's federally authorized environmental programs because § 10.1-1198 precludes granting a privilege to documents required by law and any immunity accorded under § 10.1-1199 is conditioned on its being consistent with federal law.[1] As you know, in order to obtain full authorization, delegation, or approval from EPA for any of these programs, the Commonwealth is required by federal law to have full authority to enforce those programs, both civilly and criminally. As such, all aspects of Virginia's environmental laws and regulations that are necessary to implement and enforce Virginia's federally authorized environmental programs in a manner that is no less stringent than their federal counterparts are necessarily "required by law."[2]

Regarding § 10.1-1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in the manner required by federal law to maintain program delegation, authorization, or approval. As to § 10.1-1199, no immunity could be afforded from administrative, civil, or criminal penalties because granting such an immunity would not be consistent with federal law, which is one of the criteria for the immunity. Granting immunity would be inconsistent with the federal requirement to have full civil and criminal enforcement authority, which is necessary for the Commonwealth's programs to remain at least as stringent as the federal counterparts.

3. Definition of "Environmental Law"

In the definition of "environmental assessment," Code § 10.1-1198 refers to "environmental laws and regulations." As noted in the September 4 letter, "environmental laws" is not defined in § 10.1-1198. See Cross-Programmatic Enclosure, No. 1. "Environmental laws" would include statutes adopted by the Virginia General Assembly to protect Virginia's environment and the

[1]Accordingly, I will not respond to the questions set forth in Number 15 of the Cross-Programmatic Enclosure.

[2]Any other interpretation would conflict with a variety of general and specific grants of authority to state agencies to obtain federal authorizations, delegations, and approvals for implementation of environmental programs.

public, mainly in terms of air, water, and waste pollution. "Regulations" would include any and all regulations adopted pursuant to these environmental laws. In addition, "environmental laws and regulations" includes permits, consent agreements, and orders by virtue of the fact that they are issued pursuant to these statutes and regulations.

4. Criminal Violations

The Environmental Privilege/Immunity Law applies by its terms only to administrative and civil enforcement actions. Thus, it does not provide a privilege from disclosure of documents and does not authorize immunity to be accorded from prosecution from criminal violations of environmental laws, regulations, permits, or orders pertaining to any of Virginia's federally authorized environmental programs. The Commonwealth retains full enforcement authority to prosecute criminal conduct. As such, the Environmental Privilege/Immunity Law has no effect on the activities listed in Number 2 of the Cross-Programmatic Enclosure. A privilege cannot be asserted under § 10.1-1198 in any criminal investigation arising under any federally authorized, delegated, or approved environmental program for any document (and information about the content of such document) that is the product of a voluntary environmental assessment.

Moreover, as noted above, the Commonwealth retains full authority for criminal enforcement because it is a requirement of federal law that Virginia have such authority in order to obtain and maintain full authorization, delegation, or approval from EPA for any of these programs. For this additional reason, the Environmental Privilege/Immunity Law does not apply to criminal prosecutions or investigations.

5. Documents Required by Law

As noted in Number 8 of the Programmatic Enclosure to the September 4 letter, Virginia's federally authorized environmental programs contain comprehensive monitoring, recordkeeping, compliance certification, and reporting requirements. For this very reason, the phrase "documents required by law" in Code § 10.1-1198 renders the privilege provision in that statute inapplicable to these programs. Likewise, the phrase "to the extent consistent with requirements imposed by federal law" in Code § 10.1-1199 renders the immunity provisions of the statutes inapplicable to these programs.

Similarly, in response to Number 4 of the Cross-Programmatic Enclosure, Code § 10.1-1198 does not provide a privilege for documents and information required to be collected, maintained, reported, or otherwise made available to the Commonwealth by statute, regulation, ordinance, permit, order, consent agreement, settlement agreement, or otherwise as provided by law. Accordingly, the privilege in § 10.1-1198 would not apply to any documents or information relevant to noncompliance with Virginia's federally authorized environmental programs.

6. Investigations by DEQ

In response to the inquiry in Number 5 of the Cross-Programmatic Enclosure, I note that the Environmental Privilege/Immunity Law does not impede or adversely affect the Commonwealth's authority to investigate possible violations of any program requirement (including any requirement of statute, regulation, ordinance, permit, order, consent agreement, settlement agreement, or as otherwise provided by law), as well as the Commonwealth's authority to verify adequate correction of any such violations and to inspect and copy any records pertaining to compliance with program requirements for the reasons set forth in the introductory paragraphs.

7. Access of Public to Documents

The Environmental Privilege/Immunity Law does not impede the public's access to documents that are required to be collected, maintained, reported, or otherwise made available to the Commonwealth or made available directly to the public under Virginia's federally authorized environmental programs. Cross-Programmatic Enclosure, No. 6.

The Law also does not impede public access to documents and information in the Commonwealth's files, whether those documents and information are voluntarily submitted or are collected pursuant to Virginia's information gathering authorities.[3] Cross-Programmatic Enclosure, No. 7. This is true because the Environmental Privilege/Immunity Law does not alter the right of Virginia's citizens to acquire any such documents pursuant to the Virginia Freedom of Information Act ("FOIA"), Code §§ 2.1-340 *et seq.* FOIA ensures that the public has ready access to records in the custody of public officials and agencies, which would include the types of documents and information addressed here. Public access is withheld only if one of the narrowly construed FOIA exceptions or exemptions apply. There is no exception or exemption in FOIA, however, for documents and information claimed as privileged under the Environmental Privilege/Immunity Law. The public, therefore, would not be precluded access to documents and information in the possession of Virginia's information gathering authorities based upon a claim of privilege under § 10.1-1198. Further, because the Environmental Privilege/Immunity Law does not expressly retain the privilege for voluntarily disclosed documents or information, any claim of privilege for such documents or information would be waived by such voluntary disclosure.

EPA has asked about the access of moving parties to documents as contemplated in § 10.1-1198(C). As provided in that statute, in an administrative or judicial proceeding a moving party would be given limited access to documents and information claimed as privileged for the purpose of proving an exception to the privilege. That limited access is available is consistent with the last sentence of § 10.1-1198(C), which provides for restrictions on that party's use of those documents and information. Furthermore, as to § 10.1-1198, if the fact-finder in the administrative or judicial proceeding concludes that the privilege does not apply, the documents or information would be

[3] "Virginia's information gathering authorities" means any agency responsible for the administration and enforcement of Virginia's federally authorized environmental programs.

subject to production through the normal discovery process. In the administrative context, this would mean the documents and information would be subject to the provisions of Code § 9-6.14:13 of the Virginia Administrative Process Act which authorizes the fact-finder to issue subpoenas requiring testimony or the production of books, papers, and physical and other evidence.

8. Protection for Whistle Blowers

In Number 9 of the Cross-Programmatic Enclosure, EPA asks whether Code § 10.1-1198 conflicts with various federal statutory protections for employee disclosure or "whistle blowers" provided for public and private employees. The Environmental Privilege/Immunity Law has no effect on any such protections. The Law serves only to prevent the Commonwealth from compelling a person to produce a document covered by the privilege. It would not sanction an employee or other person for disclosing such a document.

9. Injunctive Relief, Civil Penalties, and Emergency Orders Regarding Harmful Activities

As noted above, documents and information that demonstrate a clear, imminent, and substantial danger to the public health or environment are not protected under the Environmental Privilege/Immunity Law. Accordingly, Virginia's ability to obtain injunctive relief, civil penalties, and emergency orders to restrain activities that are endangering or causing damage to public health or the environment would not be affected. See Cross-Programmatic Enclosure, No. 10 and No. 12. The Commonwealth would not be obstructed in the collection of evidence in such situations because the evidence, pursuant to Code § 10.1-1189, would not be protected under the Environmental Privilege/Immunity Law.

EPA has asked whether voluntary testing that indicated levels greater than regulatory limits, but not so high as to be a "clear, imminent, and substantial danger to public health or environment," would be privileged. The answer is no. As noted in the introductory section above, documents and other information -- which would include results of such testing -- needed for civil or criminal enforcement of one of Virginia's federal environmental programs would not be privileged because they are required by law in order for the Commonwealth to meet the federal requirement to have full civil and criminal enforcement authority at least as stringent as the federal counterparts.

10. "Federal Law" as Used in Code § 10.1-1199

The term "federal law" in Code § 10.1-1199 includes federal statutes, federal common law (as decided by federal courts and administrative tribunals), federal regulations, and the Federal Rules of Evidence, Civil Procedure, and Appellate Procedure. See Cross-Programmatic Enclosure, No. 11.

11. Citizen Suits

In Number 13 of the Cross-Programmatic Enclosure, EPA inquires whether Code § 10.1-1199 would bar civil penalty recovery by citizens pursuant to § 304 of the CAA and § 7002 of RCRA. Section 10.1-1199 would not bar citizen suits and civil penalty recovery by citizens bringing those suits because the immunity could not be used to defend against an action in federal court. That defense is available only in suits brought in Virginia state court. In addition, the immunity would not be available because § 10.1-1199 conditions the use of that immunity on it being consistent with requirements imposed by federal law. Use of the immunity to preclude the imposition of civil penalties in federal citizen suits would not be consistent with requirements of federal law.[4]

It is the Commonwealth's intention to append this letter to and incorporate it by reference in all Attorney General's statements or certifications included in applications for any program that is to be delegated, approved, or authorized by EPA. Further, we will apprise you if any changes in Virginia state law alter the conclusions of this letter. Please let me know if you have any questions about the above.

Sincerely yours,

Richard Cullen
Attorney General of Virginia

MJL\air\auditgeneral
cc: The Honorable Becky Norton Dunlop
The Honorable Robert C. Metcalf
Randolph L. Gordon
Thomas L. Hopkins

[4]Virginia law does not provide for citizen suits, so your inquiry does not apply in that context.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MEMORANDUM

SUBJECT: Statement of Principles
Effect of State Audit Immunity/Privilege Laws
On Enforcement Authority for Federal Programs

TO: Regional Administrators

FROM: Steven A. Herman
Assistant Administrator, OECA

Robert Perciasepe
Assistant Administrator, OPPE

Mary Nichols
Assistant Administrator, OAR

Timothy Fields
Acting Assistant Administrator, OSWER

Under federal law, states must have adequate authority to enforce the requirements of any federal programs they are authorized to administer. Some state audit immunity/privilege laws place restrictions on the ability of states to obtain penalties and injunctive relief for violations of federal program requirements, or to obtain information that may be needed to determine compliance status. This statement of principles reflects EPA's orientation to approving new state programs or program modifications in the face of state audit laws that restrict state enforcement and information gathering authority. While such state laws may raise questions about other federal program requirements, this statement is limited to the question of when enforcement and information gathering authority may be considered adequate for the purpose of approving or delegating programs in states with audit privilege or immunity laws.

I. Audit Immunity Laws

Federal law and regulation requires states to have authority to obtain injunctive relief, and civil and criminal penalties for any violation of program requirements. In determining whether to authorize or approve a program or program modification in a state with an audit immunity law, EPA must consider whether the state's enforcement authority meets federal program requirements. To maintain such authority while at the same time providing incentives for self-policing in appropriate circumstances, states should rely on policies rather than enact statutory immunities for any violations. However, in determining whether these requirements are met in states with laws pertaining to voluntary auditing, EPA will be particularly concerned, among other factors, with whether the state has the ability to:

1) Obtain immediate and complete injunctive relief;

2) Recover civil penalties for:

i) significant economic benefit;

ii) repeat violations and violations of judicial or administrative orders;

iii) serious harm;

iv) activities that may present imminent & substantial endangerment.

3) Obtain criminal fines/sanctions for wilful and knowing violations of federal law, and in addition for violations that result from gross negligence under the Clean Water Act.

The presumption is that each of these authorities must be present at a minimum before the state's enforcement authority may be considered adequate. However, other factors in the statute may eliminate or so narrow the scope of penalty immunity to the point where EPA's concerns are met. For example:

1) The immunity provided by the statute may be limited to minor violations and contain other restrictions that sharply limit its applicability to federal programs.

2) The statute may include explicit provisions that make it inapplicable to federal programs.

II. Audit Privilege Laws

Adequate civil and criminal enforcement authority means that the state must have the ability to obtain information needed to identify noncompliance and criminal conduct. In

determining whether to authorize or approve a program or program modification in a state with an audit privilege law, EPA expects the state to:

1) retain information gathering authority it is required to have under the specific requirements of regulations governing authorized or delegated programs;

2) avoid making the privilege applicable to criminal investigations, grand jury proceedings, and prosecutions, or exempted evidence of criminal conduct from the scope of privilege;

3) preserve the right of the public to obtain information about noncompliance, report violations and bring enforcement actions for violations of federal environmental law. For example, sanctions for whistleblowers or state laws that prevent citizens from obtaining information about noncompliance to which they are entitled under federal law appear to be inconsistent with this requirement.

III. Applicability of Principles

It is important for EPA to clearly communicate its position to states and to interpret the requirements for enforcement authority consistently. Accordingly, these principles will be applied in reviewing whether enforcement authority is adequate under the following programs:

1) National Pollutant Discharge Elimination System (NPDES), Pretreatment and Wetlands programs under the Clean Water Act;

2) Public Water Supply Systems and Underground Injection Control programs under the Safe Drinking Water Act;

3) Hazardous Waste (Subtitle C) and Underground Storage Tank (Subtitle I) programs under the Resource Conservation Recovery Act;

4) Title V, New Source Performance Standards, National Emission Standards for Hazardous Air Pollutants, and New Source Review Programs under the Clean Air Act.

These principles are subject to three important qualifications:

1) While these principles will be consistently applied in reviewing state enforcement authority under federal programs, state laws vary in their detail. It will be important to scrutinize the provisions of such statutes closely in determining whether enforcement authority is provided.

2) Many provisions of state law may be ambiguous, and it will generally be important to obtain an opinion from the state Attorney General regarding the meaning of the state law

and the effect of the state's law on its enforcement authority as it is outlined in these principles. Depending on its conclusions, EPA may determine that the Attorney General's opinion is sufficient to establish that the state has the required enforcement authority.

3) These principles are broadly applicable to the requirements for penalty and information gathering authority for each of the programs cited above. To the extent that different or more specific requirements for enforcement authority may be found in federal law or regulations, EPA will take these into account in conducting its review of state programs. In addition, this memorandum does not address other issues that could be raised by state audit laws, such as the scope of public participation or the availability to the public of information within the state's possession.

IV. Next Steps

Regional offices should, in consultation with OECA and national program offices, develop a state-by-state plan to work with states to remedy any problems identified pursuant to application of these principles. As a first step, regions should contact state attorneys general for an opinion regarding the effect of any audit privilege or immunity law on enforcement authority as discussed in these principles.